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No. 84-1496

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HAMPTON ROADS SHIPPING ASSOCIATION,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 846, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 970, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 1248, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

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Although the cross-petition smothers them in extraneous details, the questions it poses for review are in substance the same as those set forth in the pending petition of Respondent International Longshoremen's Association, AFL-CIO (ILA), in Docket No. 84-1314. They raise an issue of national importance as to which the circuits are in disagreement: whether under Norris-LaGuardia Act § 4(a), 29 U.S.C. § 104(a) and the decision in *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235 (1970), a district court has jurisdiction to issue a preliminary injunction during the period between the issuance of an arbitration award in favor of the union and judicial confirmation of the award.

As argued in the ILA's petition, these questions should certainly be decided by the Supreme Court. However, since they are presented in their most basic terms in the petition in No. 84-1314 and are obscured by irrelevancies in the instant cross-petition, the former should be granted and the latter denied.

The questions posed in the cross-petition obscure the principle of law by attempting to argue the merits of the confirmation proceeding,—whether a Master Contract or local contract issue was involved and whether the award was the result of a fair hearing. To consider the issue in terms of these unique factual conditions would render a decision by this Court useful only in identical circumstances. Moreover, the factual questions, which are the substance of the confirmation proceeding, are hardly ripe for Supreme Court review.[1]

The petition in No. 84-1314 raises the legal questions without regard to the peculiarities of this case. The issue is not what particular challenges a disappointed employer may raise to an award but whether injunctive relief is possible at all, once the union has complied with its obligation to arbitrate. The decision for which review is sought prescinds from any consideration of the merits of the confirmation proceeding. It sustains the injunction solely because the award has been challenged.

Despite cross-petitioner's attempt to smooth over the conflict, the Fourth Circuit's decision cannot be reconciled with the Fifth Circuit Rule, enunciated in *Sea-Land Service, Inc.* v. *International Longshoremen's Association*, 625 F.2d 38 (5th Cir. 1980) and reiterated in a case arising out of

[1] The United States District Court for the Southern District of New York confirmed the award in favor of the ILA. *International Longshoremen's Ass'n* v. *West Gulf Maritime Ass'n*, No. 9080 (S.D. N.Y. Feb. 15, 1985), *appeal docketed*, No. 85-7136 (2d Cir. Mar. 1, 1985). The appeal was argued to the Second Circuit on March 18, 1985 but has not yet been decided.

the same events that precipitated this case. *West Gulf Maritime Association* v. *ILA Deep Sea Local 24, South Atlantic and Gulf Coast District, et al.*, 751 F.2d 721 (5th Cir. 1985), *reh'g denied*, Feb. 7, 1985, *petition for stay of mandate pending a petition for writ of certiorari denied*, Feb. 21, 1985. The Fifth Circuit holds that no *Boys Markets* injunction is possible pending judicial confirmation of an award where the union has contractually reserved the right to strike. The Fourth Circuit permits a *Boys Markets* injunction while the courts review an award. The Fourth Circuit, recognizing that the award was rendered pursuant to the Master Contract, found an implied no-strike clause in the Master Contract and vitiated the express language of the Master Contract that, once an award is rendered, the provisions of any no-strike clause are inapplicable and the union may withhold labor from any employer which refuses to comply with the award. It did so by the expedient of ruling that this clause presupposes a "valid" award. Whether the award is valid is, of course, the issue in the confirmation proceeding. Thus, the Fourth Circuit, unlike the Fifth, permits a *Boys Markets* injunction after arbitration, even where there is an express reservation of the right to strike.[2] This court should grant a writ of certiorari to resolve the conflict and clarify the parameters of its earlier decision.

For the foregoing reasons and those set forth in the petition in Docket No. 83-1314, the cross-petition should be

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[2] The extent to which the decision in this case expands the "narrow" *Boys Markets* exception into a gaping hole is illustrated by the subsequent history of the confirmation proceeding. Having confirmed the award, the Southern District of New York stayed its judgment pending appeal. On March 5, 1985 the Second Circuit vacated the stay, but only on condition that the union, which had prevailed at arbitration and in the district court, post a $1,392,000.00 bond. Thus, the effect of the Fourth Circuit's sanctioning the injunction in the present case has been to permit a *Boys Markets* injunction not merely pending judicial confirmation of the award but pending appellate review of the confirmation.

denied and the petition in Docket No. 84-1314 should be granted.

Dated: April 11, 1985

Respectfully submitted,

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